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Supreme Court, U.S.
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No. 09-57

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IN THE

Supreme Court of the United States

October Term, 2008

PETER PAUL MITRANO,
Petitioner,

versus

VIRGINIA L. KELLY,
Respondent.

On Petition for a Writ of Certiorari to the
Court of Special Appeals of Maryland

PETITION FOR WRIT OF CERTIORARI

Peter Paul Mitrano
Pro se
4912 Oakcrest Drive
Fairfax, Virginia 22030

Petitioner

May 14, 2009

Questions Presented for Review

1. Was the court in the State of Maryland required to enforce a custody order from the Commonwealth of Virginia entered pursuant to 28 U.S.C. § 1738A (also know as the Parental Kidnapping Prevention Act (PKPA))?

2. Is a New Hampshire Order custody order that was issued in violation of 28 U.S.C. § 1738A void as a matter of law?

3. *Arguendo*, did the court in the State of Maryland err in not ruling on Mitrano's petition to modify custody and/or any alleged support order from the State of New Hampshire?

4. Were the constitutional rights of Mitrano violated?

5. Does Mitrano have a right to start a revolution?

Parties to the Proceeding

The caption of this case in this Supreme Court of the United States contains the names of all parties before the courts below. No party is a parent, subsidiary or affiliate of any company.

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October Term, 2008

PETER PAUL MITRANO,

Petitioner,

v.

VIRGINIA L. KELLY,

Respondent.

Peter Paul Mitrano, *pro se*, respectfully petitions for a writ of certiorari to review the judgments of the Court of Special Appeals of the State of Maryland in this case.

Opinion Below

The Order of the Court of Appeals of the State of Maryland (in Petition Docket No. 544) denying a writ of certiorari to the Court of Special Appeals of the State of Maryland is dated February 13, 2009. See *Mitrano* v. *Kelly*, 407 Md. 277, 964 A.2d 676, (Table) certiorari denied (2008). A judgment of the Court of Special Appeals of the State of Maryland (No. 531) from which petitioner seeks certiorari is dated November 21, 2008. Another judgment of the Court of Special Appeals of the State of Maryland (No. 2804) from which petitioner seeks certiorari is dated August 20, 2007. See *Mitrano* v. *Kelly*, 402 Md. 354, 936 A.2d 851, (Table) certiorari denied (2007). All lower court decisions are officially unreported.

Jurisdiction

The Order of the Court of Appeals of the State of Maryland denying a writ of certiorari to the Court of Special Appeals of the State of Maryland was entered on February 13, 2009. For purposes of this matter, said Order is final. This petition for writ of certiorari was filed within ninety days of said date of February 13, 2009. This Court's jurisdiction is invoked under 28 U.S.C., § 1257(a).

Constitutional Provisions and Statutes

Article VI, the Fifth and Fourteenth Amendments and Title 28 U.S.C., § 1738A.

Statement of the Case

This case arises from an action filed by petitioner Peter Paul Mitrano (hereinafter sometimes referred to as "Mitrano" and/or "father") against respondent, Virginia L. Kelly (hereinafter sometimes referred to as "Kelly" and/or "mother"), for enforcement of a custody order from the Commonwealth of Virginia. The petitioner contends that an alleged custody order judgment from the State of New Hampshire is void.

On January 16, 2007, Mitrano filed a complaint for enforcement of a Virginia custody order pursuant to Title 28 of the United States Code, Section 1738A along with a request for other relief. The next day on January 17, 2007, Mitrano filed an Emergency Motion and/or

Request and/or Second Verified Application for the Issuance of a Warrant to Take Custody of Child and also on January 17, 2007, Mitrano also filed Plaintiff's Emergency Motion to Determine Whether the Subject New Hampshire Order is Void as a Matter of Law. On January 17, 2007, the Honorable Durke G. Thompson of the Circuit Court for Montgomery County, Maryland denied Mitrano's Verified Application for the Issuance of a Warrant to Take Physical Custody of Child and refused to rule upon Plaintiff's Emergency Motion to Determine Whether the Subject New Hampshire Order is Void as a Matter of Law that was filed on January 17, 2007.

Thereafter, Mitrano filed an interlocutory appeal (No. 2804 before the Court of Special Appeals of Maryland) which was dismissed. Mitrano then filed a Petition for Writ of Certiorari (No. 331 before the Court of Appeals of Maryland) which the Court of Appeals of Maryland denied. On remand to the trial Court, on April 18, 2008, the Honorable Michael D. Mason of the Circuit Court for Montgomery County, Maryland dismissed the action with prejudice, sua sponte, on the basis that the case was barred under the doctrine of claim preclusion. Mitrano then timely filed an appeal of the dismissal of the case, No. 531, before the Court of Special Appeals of Maryland which was affirmed in an opinion written by the Honorable Charles E. Moylan, Jr. dated November 21, 2008. Thereafter, on February 13, 2009, the Court of Appeals of Maryland denied a Petition for Writ of Certiorari (No. 544).

The father has been denied the right to see his son Christopher since January 5, 2001 (except once in February 2008 when his son visited petitioner's brother at Yale-New Haven Hospital) when the respondent Kelly took the child from Fairfax, Virginia for an alleged visitation on Friday, January 5, 2001 and failed to return the child on the following Monday, January 8, 2001.

As difficult as this matter has been since January 5, 2001 when the father last saw his son Christopher (except once in February 2008 when his son visited petitioner's brother at Yale-New Haven Hospital) (note litigation commenced in 2000 and further note that a daughter reached the age of majority on October 4, 2003 and that an older son reached the age of majority on December 27, 2004), the father continues to pursue this matter in part in the hopes of sending a message on behalf of other parents.

Reasons for Granting the Petition

It was a grave injustice for the trial court to dismiss this action and it was another grave injustice for the Court of Special Appeals to affirm the judgment of the trial court. As Mitrano stated in paragraph numbered one of the complaint filed before the trial court, Title 28 United States Code, § 1738A, also know as the Parental Kidnapping Prevention Act (PKPA), provided the trial court with subject-matter jurisdiction. Note that because the legal issue is predicted upon an issue of federal law, any

state court rulings are not dispositive of the outcome before a federal court, see *United States* v. *Bedford*, 519 F.2d 650, 654 n. 3 (3rd Cir. 1975), cert. denied 424 U.S. 917 (1976) ("It is a recognized principle that a federal court is not bound by a state court's interpretation of federal laws or of a state statute under misapprehension of federal law."); *Meade* v. *Meade*, 812 F.2d 1473, 1477 (4th Cir. 1987) ("Faced with inconsistent [custody] decrees, a federal court must determine the relevant state law in the ordinary fashion, and the Virginia [state court] opinion, while entitled to some deference, must be rejected if clearly mistaken."); *In re Cummings*, 297 B.R. 701, 707 (Ill. 2003) ("decisions of state courts are never dispositive on issues of federal law"); *Surrick* v. *Killion*, 449 F.3d 520, 535 (3rd Cir. 2006) ("decisions of the Pennsylvania Supreme Court do not bind this Court with respect to federal law"); *Evans* v. *Thompson*, 518 F.3d 1, 10 (1st Cir. 2008) rehearing denied, rehearing en banc denied, 524 F.3d 1 (1st Cir. 2008) ("There is no impairment of lower federal courts' independent interpretative authority: such courts still have authority to decide whether a state court decision is wrong, and whether the decision is, in addition, unreasonably so."); *Hall* v. *Norfolk Southern Ry. Co.*, 829 F.Supp 1571, 1575 n. 3 ("The Court notes that in considering this question it is not limited to or bound by the law of the forum state."); *United States* v. *Rickus*, 566 F.Supp. 96, 98 n. 3 (Pa. 1983) ("'a federal court is not bound by a state statute under misapprehension of federal law.'"); *Tereance D.*

v. *School Dist. Of Philadelphia*, 370 F.Supp.2d 739, 745 n. 7 (Pa. 2008) ("State court interpretations of federal law are not binding on this court."); and, *Industrial Consultants, Inc.* v. *H. S. Equities, Inc.*, 646 F.2d 746, 749 (2nd Cir. 1981) ("The district court was not bound to adopt the Oklahoma court's interpretation of federal constitutional principles, even as applied to Oklahoma statutes."). Also see 45 Ohio State Law Journal 429, 453 (1984) Remedies for Parental Kidnapping in Federal Court: A Comment Applying the Parental Kidnapping Prevention Act in Support of Judge Edwards by Joan M. Krauskopf stating "The custodian [parent] is forced into the courts of the abductor's state, which have shown an alarming tendency to continue their parochial protection of their own residents even under the PKPA." Clearly, the doctrine of federal pre-emption applies to the subject New Hampshire Lebanon Family Court custody order dated September 27, 2002. Article VI of the United States Constitution clearly provides in part that:

> "(T)he Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Thus, Mitrano contends pursuant to the above-quoted language of the United States Constitution that this Supreme Court should

enforce the terms of 28 U.S.C. § 1738A regardless of what any other state courts may say what said federal law is. Said above-quoted language of the United States Constitution supercedes any state laws and/or rules and/or rulings that conflict with said above-quoted language of thc United States Constitution. Also see *Sola Elec. Co.* v. *Jefferson Elec. Co.*, 317 U.S. 173, 176 (1942) ("It is familiar doctrine that the prohibition of a federal statute may not be set at naught, or it benefits denied, by state statutes or state common law rules."). In *Crater* v. *Galaza*, 508 F.3d 1261, 1266 (9th Cir. 2007), the court further explained:

> ". . . *Marbury* established another fundamental function of the Article III 'judicial power': . . .
>
> "The Court extended this supremacy-maintaining principle to the federal courts' review of state decisions in *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 4 L.Ed. 97 (1816), and *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 . . . the Court had the authority and the responsibility to ensure that state court rulings conformed to the dictates of the Constitution. Once a federal court was charged with reviewing state court judgments, it could not, consistent with its duty to maintain the supremacy of the Constitution, uphold state court rulings that it contended violated that supreme law . . . ."

Arguendo (Mitrano contends that there has not been a final decision on the merits as to whether the New Hampshire order is void; but, even if it was determined that there had been a decision), in the instant case, Mitrano contends that other state courts do not have the final say as to the interpretation of the federal law contained in 28 U.S.C., § 1738A. Mitrano has steadfastly maintained that the subject custody order from the State of New Hampshire is void as a matter of law. Under New Hampshire law, a void judgment can be attacked at any time. Other states are not allowed to bootstrap a void judgment from New Hampshire into any form of valid existence under New Hampshire law. Mitrano contends the law of the State of New Hampshire, not the law of the State of Maryland, controls which state law is applicable in applying the doctrine of issue preclusion. Also note as stated in *Mitrano* v. *Houser*, 240 S.W.3d 854, 861 (Tenn. 2007):

> "Mr. Mitrano argues in his brief that 'the law of the State of New Hampshire, not the law of the State of Tennessee, dictates whether or not the doctrine of issue preclusion (footnote omitted) precludes this action from proceeding.' We agree. This court has frequently stated that 'the full faith and credit clause requires that the common law doctrine of *res judicata* be applied in one state to a judgment rendered in another state

> to the same extent that it applied in the state of its rendition.'" (Citations omitted.)

Also see *Rourke* v. *Amchem*, 384 Md. 329, 863 A.2d 926, 935 (2004) ("[T]he United States Supreme Court has made clear that, in determining the preclusive effect to be given to the judgment of a State court, the claim and issue preclusion rules of the State that rendered the judgment must govern").

Moreover, with all due respect, despite the conclusory statements by the Court of Special Appeals, there have not been any decisions on the merits that have determined that the subject custody dated September 27, 2002 from the State of New Hampshire is <u>not</u> void as a matter of law. The actions brought in the federal courts were not decided on the merits. The actions brought in the State of Vermont and the Commonwealth of Virginia were filed prior to the date of the subject custody order dated September 27, 2002 from the State of New Hampshire. In addition, the action in the State of Vermont is not a final order because it is still subject to review before this Supreme Court. The actions in the Commonwealth of Virginia were not decided on the merits. See *Mitrano* v. *Kelly*, 172 Vt. 643, 785 A.2d 191 (2001) (table decision), cert. denied 534 U.S. 1115 (2002), on remand, 175 Vt. 639, 824 A.2d 609 (2003) (table decision), cert. denied 540 U.S. 825 (2003), on remand and pending in family court in Windsor, Vermont; *Mitrano* v. *Kelly*, (unpublished decision from family court

in Lebanon, New Hampshire), cert. denied 537 U.S. 1161 (2003), rehearing denied 538 U.S. 940 (2003); *Mitrano* v. *Martin*, (unpublished decision from First Circuit), cert. denied 537 U.S. 1160 (2003); *Mitrano* v. *Kelly*, denial by Circuit Court of Fairfax County, Virginia dated January 5, 2001 for emergency relief, appeal dismissed; etc.; *Mitrano* v. *Warshell*, 150 Fed.App. 277 (4th Cir. 2005) (appellant's brief appears at 2004 WL 3489024 and appellant's reply brief appears at 2004 WL 3489022), certiorari denied, 547 U.S. 1098 (2006); *Mitrano* v. *Warshell*, (unpublished decision from First Circuit) certiorari denied, 547 U.S. 1129 (2006); *Mitrano* v. *Kelly*, (unpublished dismissal from New Hampshire Supreme Court), certiorari denied, 549 U.S. 889 (2006); and *Mitrano* v. *Kelly*, (unpublished from Court of Special Appeals dated August 20, 2007, No. 2804), 402 Md. 354, 936 A.2d 851, (Table) certiorari denied (2007). Also note *Thompson* v. *County of Franklin*, 15 F.3d 245, 253 (2nd Cir. 1994), wherein the court stated "dismissals for lack of subject matter jurisdiction are not on the merits and are not accorded res judicata effect". See *St. Pierre* v. *Dyer*, 208 F.3d 394, 400 (2nd Cir. 2000) ("a dismissal for lack of subject matter jurisdiction is not an adjudication of the merits and hence has no res judicata effect"); *Leaf* v. *Supreme Court of State of Wis*, 979 F.2d 589, 595 (7th Cir. 1992) cert. denied 508 U.S. 941 (1993) ("dismissal for lack of subject-matter jurisdiction under Federal Rules of Civil Procedure 12(b)(1) and 41(b) is not a decision on the merits and, therefore, constitutes

dismissal without prejudice"); and, *Goldsmith* v. *Mayor and City Council of Baltimore*, 987 F.2d 1064, 1069 (4th Cir. 1993) ("In that case we held that the district court was without jurisdiction to consider Miss Goldsmith's claims because those claims were so insubstantial as to be frivolous . . . . As a jurisdictional dismissal, the judgment in *Goldsmith I* is not a judgment on the merits for purposes of res judicata . . . .")

The law in the State of New Hampshire is that a void judgment can be attacked at any time. In *Kittredge* v. *Emerson*, 15 N.H. 227, 262, 263 (1844), the court stated:

> "'. . . But if it act without authority, its judgments and orders are regarded as nullities. They are not voidable, but simply void; and form no bar to a recovery sought, even prior to a reversal, in opposition to them. They constitute no justification; and all persons concerned in exceeding such judgments or sentences, are considered in law as trespassers.' 1 Peters's R. 340, Elliot vs. Piersol.
>
> ". . . If there is a total want of jurisdiction, the proceedings are void and a mere nullity, and confer no right, and afford no justification, and may be rejected when collaterally drawn in question.' 2 Peters's R. 163, Thompson vs. Tolmie."

Also see *Coleman Bros. Corp.* v. *City of Franklin*, 58 F.Supp. 551, 554 (N.H. 1945) ("The want of jurisdiction in any tribunal renders its proceedings void and when the want of jurisdiction is shown by the record and proceedings themselves, it may be taken advantage of at any time."); *Patterson* v. *Patterson*, 306 F.3d 1156, 1159 (1st Cir. 2002) ("In New Hampshire, '[t]he probate court is not a court of general jurisdiction'") and *State* v. *Moquin*, 105 N.H. 9, 13, 191 A.2d 541, 544-545 (1963) where the dissent stated:

> "Unlike the district courts of Massachusetts which are courts of 'general and superior jurisdiction' . . . the municipal courts of New Hampshire have limited jurisdiction . . . ."

Moreover, in the instant case, also note that it was premature for the lower courts in the State of Maryland to rule on the affirmative defense of issue preclusion. See *Poteet* v. *Sauter*, 136 Md.App. 383, 766 A.2d 150, 164 (2001) ("Res judicata is an affirmative defense that bars the relitigation of matters previously litigated") and *Exxon Mobil Corp.* v. *Saudi Basic Industries*, 544 U.S. 280, 293 (2005) ("Preclusion, of course, is not a jurisdictional matter. See Fed. Rule Civ. Proc. 8(c) (listing res judicata as an affirmative defense)"). In *Usrey* v. *Lewis*, 553 S.W.2d 612, 614 (Tenn. 1977), the court stated:

> "It appears, therefore, that res judicata is an *affirmative* defense which must be *plead* specially. It would therefore appear that the proper method to present the defense of res judicata is by a *pleading* (answer), and not by a motion . . ." (Italicized text in original quotation.)

In *Gregory* v. *Gregory*, 803 S.W.2d 242, 243 (Tenn. Ct. App. 1990), the court stated:

> "In order to succeed on a plea of *res judicata*, or estoppel by judgment, the party raising the defenses must plead it, Tenn.R.Civ.P. 8.03, and must carry the burden of proving it . . . ." (Citation omitted.)

Note Kelly did not plead the affirmative defense of issue preclusion and the trial court committed error by sua sponte dismissing this action predicated on the affirmative defense of issue preclusion. See *Uffner* v. *La Reunion Francaise, S.A.*, 244 F.3d 38, 41 (1st Cir. 2001) (when an objection to personal jurisdiction was not made before the district court, the court should not have raised the issue *sua sponte* because the court has no independent reason to raise the issue when the objection had been waived).

Back in 1873, in *Thompson* v. *Whitman*, 85 U.S. 457, 469 (1873), this Supreme Court stated in a case filed in federal court in the State of New York challenging the subject-matter jurisdiction of justices of the peace in the State of New Jersey that:

> "On the whole, we think it clear that the jurisdiction of the court by which a judgment is rendered in any State may be questioned in a collateral proceeding in another State, notwithstanding the provision of the fourth article of the Constitution and the law of 1790, and notwithstanding the averments contained in the record of the judgment itself."

Thus, a reading of *Thompson* v. *Whitman*, clearly supports Mitrano's position that a void judgment from the state courts of the State of New Hampshire may be attacked. The state court in the State of New Hampshire was a court of limited and inferior authority. See *State* v. *Flynn*, 110 N.H. 451, 453, 272 A.2d 591, 593 (1970) ("District courts, like municipal courts, are courts of special and limited jurisdiction which are not vested with as broad inherent powers as courts of superior and general jurisdiction."); and, *Kiluk* v. *Potter*, 133 N.H. 67, 68-70, 572 A.2d 1157, 1158 (1990).

In *Galpin* v. *Page*, 85 U.S. 350, 365-366 (1873) which was also decided 1873, the same

year as *Thompson* v. *Whitman*, this Supreme Court further explained that there is a different standard applied when a court of general jurisdiction makes a determination with respect to its jurisdiction as opposed to a court of limited and inferior authority such the subject state court in the State of New Hampshire and stated:

> ". . . The rule is different with respect to courts of special and limited authority; as to them there is no presumption of law in favor of their jurisdiction; that must affirmatively appear by sufficient evidence or proper averment in the record, or their judgments will be deemed void on their face."

Also see *Kalb* v. *Feuerstein*, 308 U.S. 433, 439 (1940) ("The States cannot, in the exercise of control over local laws and practice, vest State courts with power to violate the supreme law of the land." (Footnote omitted.)). In the footnote numbered 12 from the case *Kalb* v. *Feuerstein*, 308 U.S. 433 (1940), the Supreme Court explained that the issue of whether a state court decision is void ab initio arises from cases unrelated to bankruptcy. Also see *Moore* v. *Dempsey*, 261 U.S. 86 (1923); *Johnson* v. *Zerbst*, 304 U.S. 458, 468 (1938) ("If this requirement of the Sixth Amendment is not complied with, the court no longer has jurisdiction to proceed."); and, *Frank* v. *Mangum*, 237 U.S. 309, 327 (1915) wherein the Supreme Court stated:

> ". . .[A]bsolutely void for want of jurisdiction in the court that pronounced it, either because such jurisdiction was absent at the beginning, or because it was lost in the course of the proceedings . . . ."

In *Durfee* v. *Duke*, 375 U.S. 106, 110, 114 (1963), this Supreme Court discussed the "rule of finality of jurisdictional determinations" with respect to courts of general jurisdiction (as opposed to courts of special and limited jurisdiction):

> ". . . [I]n the leading case of *Thompson* v. *Whitman*, 18 Wall. 457 . . . 'we think it clear that the jurisdiction of the court by which a judgment is rendered in any State may be questioned in a collateral proceeding in another State, notwithstanding the provision of the fourth article of the Constitution and the law of 1790, and notwithstanding the averments contained in the record of the judgment . . .
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> . . .
>
> "To be sure, the general rule of finality of jurisdictional determinations is not without exceptions. Doctrines of federal pre-emption or sovereign immunity may in some contexts be controlling. *Kalb* v. *Feuerstein*, 308

> U.S. 433 . . . *United States* v. *United States Fidelity & Guaranty Co.*, 309 U.S. 506 . . . ."

Also note that in *Sherrer* v. *Sherrer*, 334 U.S. 343, 357-358 (1948), Justice Frankfurter of this Supreme Court stated in an dissenting opinion that:

> "It would certainly have been easier if from the beginning the Full Faith and Credit Clause had been construed to mean that the assumption of jurisdiction by the courts of a State would be conclusive, so that every other State would have to respect it. But such certainly has not been the law since 1873. *Thompson v. Whitman*, 18 Wall. 457, 21 L.Ed. 897 . . . ."

Also see *State* v. *Bushoug*, 109 N.E.2d 692, 694, 695 (Ohio 1951) where the court stated:

> "No presumption prevails in favor of the jurisdiction of a court or tribunal of inferior, limited or special jurisdiction and it is necessary, in order to sustain the proceedings of such a court, that the record show affirmatively that the court had jurisdiction. 21 C.J.S., Courts, § 105, p. 159; 14 American Jurisprudence, 251, Courts, Section 8.
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> . . .

> "The judgments of courts of special and limited jurisdiction may be examined thoroughly for the facts and evidence necessary to sustain them, as the decisions do not furnish evidence in themselves to show jurisdiction and its lawful exercise and every requisite for either jurisdiction or its lawful exercise must appear upon the face of the proceedings or they are a nullity. 21 C.J.S., Courts, § 2, p. 19."

Also see *Grignon's Lessee* v. *Astor*, 43 U.S. 319, 341 (1844) ("That applies to 'courts of special and limited jurisdiction, which are created on such principles that their judgments, taken alone, are entirely disregarded, and the proceedings must show their jurisdiction"); *McCormick* v. *Sullivant*, 23 U.S. 192, 199-200 (1825), ("inferior Courts, in the technical sense of those words, whose judgments, taken alone, are to be disregarded"); *Smith* v. *Knowlton*, 11 N.H. 191, 198 (1840) ("The court having no jurisdiction of the cause, the whole proceedings are void"); and, *Gorrill* v. *Whittier*, 3 N.H. 265, 269 (1825) ("So where a court of limited jurisdiction takes cognizance of a cause, not within its jurisdiction, the whole proceeding is *coram non judice* and void.")

Thus, this Supreme Court has ruled that "**courts of a special and limited jurisdiction**" "**must show their jurisdiction**" or "**their judgments, taken alone, are entirely**

disregarded". In other words, if a court (such as the instant New Hampshire state court) is of special and limited jurisdiction, its judgment is a nullity if the said court does not have jurisdiction. Mitrano contends that it is clear that the subject state court orders and/or decisions from the state court in the State of New Hampshire are void. Also see *Kempe's Lessee* v. *Kennedy*, 9 U.S. 173, 185 (1809); *McCormick* v. *Sullivant*, 23 U.S. 192, 199-200 (1825) ("if the decree had been considered as a nullity, on the ground that jurisdiction was not stated in the proceedings"). In other words, because the subject New Hampshire state court is of special and limited jurisdiction, its judgment is a nullity if said court does not have jurisdiction. See *Randall* v. *Brigham*, 74 U.S. 523, 535-536 (1868) ("In reference to judges of limited and inferior authority, it has been held that they are protected only when they act within their jurisdiction"); *Bradley* v. *Fisher*, 80 U.S. 335, 351 (1871); *Forrester* v. *White*, 484 U.S 219, 228 (1988). Also see *Plant Equip.* v. *Nationwide Control Serv.*, 798 N.E.2d 1202, 1206 (Ohio 2003) ("A judgment can be void not only for lack jurisdiction, but also where the court acts in a manner contrary to due process . . . A void judgment is a nullity. It may be collaterally attacked at any time"); *Rankin* v. *Howard*, 633 F.2d 844, 849 (9th Cir. 1980) certiorari denied *Zellar* v. *Rankin*, 451 U.S. 939 (1981); and, *Ableman* v. *Booth*, 62 U.S. 506, 524 (1858). Also note *Spoors* v. *Coen*, 44 Ohio St. 497 (1886) and Rosenberg, *Stump v. Sparkman*: The Doctrine of Judicial Impunity,

64 Va.L.Rev. 833, 843 (1978) ("the very point in creating courts of limited jurisdiction is to assure that their authority is confined within more or less carefully delineated borders").

The orders from the State of New Hampshire violated 28 U.S.C. § 1738A.

By way of background, the ex parte orders from the State of New Hampshire violated 28 U.S.C. § 1738A(e). Note that in *Ex parte D. B.*, 975 So.2d 940, 954-955 (Ala. 2007), the court stated in part that:

> "Even more important than whether the notice requirements of Nebraska were met, however, is **whether the notice requirements of the PKPA were met**. **To be enforceable** in Alabama, the Nebraska custody determination ultimately **would have to comply with § 1738A(e) of the PKPA**, which provides: 'Before a child custody or visitation determination is made, reasonable notice and opportunity to be heard shall be given to ... any person who has physical custody of a child.'" (Footnote omitted.) (Bold emphasis added.)

Because 28 U.S.C., § 1738A(e) was violated when the State of New Hampshire issued the ex parte orders in the instant case, said ex parte orders are and remain unenforceable.

It is also important to note that the State of New Hampshire clearly lost subject-matter jurisdiction when Mitrano left the State of New Hampshire at the end of the day of December 20, 2000. The State of New Hampshire did not regain subject-matter jurisdiction at a later date while the matter proceeded unlawfully in the courts of the State of New Hampshire. In the case of *In re Marriage of Sareen*, 62 Cal.Rptr.3d 687, 690-691, 693 (2007), cert. denied 128 S.Ct. 1670 (2008), the court stated in part:

> ". . . [A]bsent an order from the Delhi court declining jurisdiction in favor of California, this Court does not have jurisdiction . . .
>
> . . .
>
> "Although there is some conflict in the parties' version of events in this case, the relevant jurisdiction facts are largely undisputed. 'We are not bound by the [trial] court's findings regarding subject matter jurisdiction, but rather 'independently reweigh the jurisdiction facts.' [Citation] '[S]ubject matter jurisdiction either exists or does not exist at the time the action is commenced' [citation] and cannot be conferred by stipulation, consent, waiver, or estoppel [Citations].'
>
> . . .

> "Although we have not found any California case holding on point, cases in other states have concluded **time spent in a forum after the filing of a child custody petition may not be counted towards the time necessary for home state jurisdiction** . . . ." (Footnote omitted.) (Bold emphasis added.)

Accordingly, because Virginia Kelly was living in the State of Vermont when she filed the action in the State of New Hampshire and because the State of New Hampshire lost subject-matter jurisdiction on December 20, 2000 when Mitrano left the State of New Hampshire, nothing thereafter restored subject-matter jurisdiction in the State of New Hampshire. Again, Mitrano contends that any judgments or orders entered by the state courts in New Hampshire are void because of a lack of subject-matter jurisdiction. The state courts of New Hampshire clearly violated 28 U.S.C. § 1738A(e) by issuing ex parte orders taking away the children from Mitrano. The doctrine of federal pre-emption, by and through 28 U.S.C. § 1738A, controlled any state proceedings. Also note that because Kelly had moved out of the State of New Hampshire into the State of Vermont on or prior to October 1, 2000, the children were living in Vermont while visiting Kelly on certain weekends and also in New Hampshire while living with Mitrano during the week and on the remaining weekends. This fact

is important because when Kelly commenced custody litigation in New Hampshire on October 16, 2000, under 28 U.S.C. § 1738A(b)(4), the children did not have a "home State". Accordingly, under 28 U.S.C. § 1738A(c)(2)(ii), New Hampshire was divested of jurisdiction when Mitrano, as the last contestant remaining in the State of New Hampshire, moved out of the State of New Hampshire. In other words, when Mitrano left the State of New Hampshire on December 20, 2000, the state courts in New Hampshire no longer has subject-matter jurisdiction pursuant to 28 U.S.C. § 1738A. Because the state court in the State of New Hampshire that issued the orders which Mitrano contends are void (because of lack of subject-matter jurisdiction) is a court of limited and inferior jurisdiction, said orders can be attacked in this action. Also see *In re Gruntz*, 202 F.3d 1074, 1087 (9th Cir. 1999).

As this Court is well aware, lack of jurisdiction over the subject-matter cannot be waived. Lack of jurisdiction over the subject-matter cannot even be stipulated to by willing adverse parties to an action. Accordingly, Mitrano contends friendly states such as the State of Maryland, State of Vermont and/or the Commonwealth of Virginia cannot dictate and/or rule and/or suggest that the subject court in the State of New Hampshire has subject-matter jurisdiction when, said New Hampshire court does not have subject-matter jurisdiction.

Another important point is that the State of New Hampshire was not a "home State" of

the children "on the date of the commencement of the proceeding". See 28 U.S.C. § 1738A(c)(2)(A)(i). Mitrano left the State of New Hampshire by the end of day of December 20, 2000. There was no contestant (a "contestant" is defined as "a person, including a parent or grandparent, who claims a right to custody or visitation of a child") living in the State of New Hampshire at the end of day of December 20, 2000. Mitrano's daughter, Christina, had been unlawfully living with her mother in the State of Vermont. Mitrano's sons were living in the Commonwealth of Virginia with Mitrano until Kelly with the assistance of William D. Philips unlawfully took said boys from the Commonwealth of Virginia to the State of Vermont under Kelly's right of visitation and failed to return said boys according to the custody Order of the Circuit Court of Fairfax County, Virginia. Accordingly, after December 20, 2000, the State of New Hampshire no longer could even be considered a "home State" to pursuant 28 U.S.C. § 1738A(c)(2)(A)(ii) because no one was left in the State of New Hampshire.

Thus, any orders issued by the State of New Hampshire after December 20, 2000 are clearly void for lack of subject-matter jurisdiction. Title 28 U.S.C. § 1738A(c)(2)(A)(ii) requires that "a contestant continues to live in such State".

There is no dispute by and through the custody order of the Circuit Court of Fairfax County, Virginia, that in 1992 the Commonwealth of Virginia "made a child custody or visitation determination" consistent

"with the provisions of" 28 U.S.C. § 1738A. Section 20-108 of the Code of Virginia provides the Commonwealth of Virginia shall continue to have jurisdiction over the custody order from Fairfax County, Virginia. In *Eichelberger* v. *Eichelberger*, 2 Va.App. 409, 412, 345 S.E.2d 10, 12 (1986), the court ruled:

> "Once a court has ruled on matters relating to the custody and care of minor children, and visitation rights of the noncustodial parent, the court retains jurisdiction throughout the minority status of the child involved. Andrews v. Geyer, 200 Va. 107, 104 S.E.2d 747, 751 (1958) . . . ."

Mitrano currently is a resident of the Commonwealth of Virginia. The children's paternal grandparents, who are contestants, have been residents of the Commonwealth of Virginia since 1972. Commonwealth of Virginia has continuing jurisdiction pursuant to 28 U.S.C. §§ 1738A(c)(2)(E) and 1738A(d). 28 U.S.C. § 1738A(d) states that:

> "(d) The jurisdiction of a court of a State which has made a child custody or visitation determination consistently with the provisions of this section continues as long as the requirement of subsection (c)(1) of this section continues to be met and such State remains the

> residence of the child or of any contestant."

Indeed, on January 4, 2001, the Juvenile and Domestic Relations District Court of Fairfax County in the Commonwealth of Virginia in Case Numbered JJ334381-01-01 and Case Numbered JJ334382-01-01 did exercise subject-matter jurisdiction on an ex parte basis at the request of Kelly and ruled on January 4, 2001 that : "Neither party to remove the children from the Commonwealth of Virginia".

Note that in *Thompson* v. *Thompson*, 484 U.S. 174 (1988) this Supreme Court ruled that 28 U.S.C. § 1738A is only a full faith and credit statute and does not create a federal right of action. Also see *Meade* v. *Meade*, 650 F.Supp. 205, 210 (N.C. 1986), affirmed 812 F.2d 1473 (4th Cir. 1987), which was decided prior to *Thompson* v. *Thompson, supra*, wherein the court stated in part that:

> ". . . Thus North Carolina is under a federal duty to enforce the decree according to its terms and acted improperly in modifying Virginia's initial decree."

Mitrano therefore contends that the Commonwealth of Virginia had and has continuing jurisdiction based upon Mitrano's residence in the Commonwealth of Virginia and/or the paternal grandparents' residence in the Commonwealth of Virginia. See the discussions about the Uniform Child-Custody

Jurisdiction and Enforcement Act (UCCJEA) contained in 32 Family Law Quarterly 267, 342 (1998), wherein it is stated with reference to said Uniform Child-Custody Jurisdiction and Enforcement Act "that a remaining grandparent . . . should not suffice to confer exclusive, continuing jurisdiction". Contrary to said UCCJEA, 28 U.S.C. § 1738A clearly provides that a remaining grandparent does in fact suffice to confer exclusive, continuing jurisdiction.

Another case discussing this issue is *Clarke* v. *Clarke*, 126 N.H. 753, 755, 758, 496 A.2d 361, 363, 365 (1985), wherein the court stated:

> "Critical to our analysis of the issue of jurisdiction presented here is the recognition that this case involves modification of an existing custody order and not formulation of an initial decree. (Citations omitted.) . . .
>
> "Unless there has been a final order by an out-of-state court declining jurisdiction to modify its custody decree, the courts of New Hampshire will not assume jurisdiction to modify such a decree."

Note that on January 4, 2001, the Commonwealth of Virginia was still excising jurisdiction and has never issue an order declining jurisdiction pursuant to 28 U.S.C. §

1738A. See Commonwealth of Virginia Case Numbered JJ334381-01-01 and Case Numbered JJ334382-01-01 stating that: "Neither party to remove the children from the Commonwealth of Virginia". Although the Commonwealth of Virginia later stated in dicta to follow an New Hampshire order; Mitrano contends said dicta was error.

Moreover, as previously stated, the State of New Hampshire was not a "home State" on the dates that Kelly filed the petitions to modify the custody order from the Commonwealth of Virginia because the children had been living in the State of Vermont part of the time with Kelly prior to the filing of the petitions. See *Neger* v. *Neger*, 93 N.J. 15, 32-33, 459 A.2d 628, 637-638 (1983), wherein the court stated:

> "As noted previously, the appellant and appellee had arranged for alternating physical custody of Carly . . . This record does not satisfy the statutory six-consecutive-month requirement. Carly had not lived with her father in California for six consecutive months 'within six months before commencement of the proceeding' involving custody in the California court . . . A contention that Carly's absence from New Jersey was temporary and therefore should not be counted as part of a six-month period assumes that residing with her father was only a visit.

> **However, the arrangement here was not truly characteristic of a visit, but consisted of fixed substantial periods of time in a regular alternating manner unrelated to holidays or vacations. It is possible, of course, that there may be no home state.** *See, e.g., In re the Marriage of Hubbard*, 315 N.W.2d 75 (Iowa 1982) (after Iowa divorce in 1976 in which mother was awarded custody of three children, mother and children moved so frequently before custody modification instituted in Iowa in 1979, that there was no 'home state')." (Bold emphasis added.)

Also see *Johnson* v. *Johnson*, 26 Va. App. 135, 149, 493 S.E.2d 668, 675 (1997), wherein the court stated:

> "In the instant case, during the time immediately preceding both the divorce decree and the consent decree of December 1993, the child spent short periods alternatively with each parent, resulting in an equal division of her time between Virginia and New York. **At that time, the child had no single home state under the UCCJA definition** . . . ." (Bold emphasis added.)

In *St. Andrie* v. *St. Andrie*, 473 So.2d 140, 144 (La. 1985), the court also found that the child had no home state when the child lived in two different states pursuant to the agreement of the parents, the court explained the situation and stated:

> "Analyzing the situation before the court under the 'home state' standard, during the six-month period prior to the institution of the custody proceeding . . . the child was in fact shuttled back and forth between Georgia and Louisiana every few months. Therefore, **it is clear that the child has no 'home state'**." (Bold emphasis added.)

Also see 45 Hastings L.J. 1329, 1344 (July 1994) wherein it is noted that "A child in a joint custody situation might have two established homes."

Also see *State Ex Rel. Conforti* v. *Wilson*, 203 W.Va. 21, 25, 506 S.E.2d 58, 62 (1998) ("Naturally, as a federal jurisdictional statute, the PKPA preempts the UCCJA by virtue of the Supremacy Clause."); *Shute* v. *Shute*, 158 Vt. 242, 247, 607 A.2d 890, 893 (1992) (PKPA preempts the UCCJA and/or the state statutes); *Matter of Adoption of Child by T.W.C.*, 636 A.2d 1083, 1088 (N.J. 1994) ("The jurisdictional requirements of the PKPA, of course, preempt those of the UCCJA if the acts are in conflict").

Because the State of New Hampshire was not a "home State" on the dates the petitions were filed by the mother, the interpretation of the following language contained in 28 U.S.C. § 1738A(c)(2)(A) is critical:

> "(A) such State (i) is the home State of the child on the date of the commencement of the proceeding, **or** (ii) had been the child's home State within six months before the date of the commencement of the proceeding and the child is absent from such State because of his removal or retention by a contestant or for other reasons, **and a contestant continues to live in such State**;" (Bold emphasis added.)

Note that in interpreting the language "**and a contestant continues to live in such State**", this Court must consider the statute as a whole. The language is different than the words "on the date of the commencement of the proceeding" that are in the beginning of above-quoted language of 28 U.S.C. § 1738A(c)(2)(A). Also note the difference in words contained in 28 U.S.C. § 1738A(d) that "such State remains the residence of the child or of any contestant". Thus in interpreting the language "**and a contestant continues to live in such State**", this Court should find that the plain language of said words means that the State of New Hampshire no longer had jurisdiction when all

the contestants stopped living in the State of New Hampshire. In the *Matter of Guardianship of Walling*, 727 P.2d 586, 590 (Okl. 1986), the court stated:

> "Paragraph 1.a also does not apply because the children were not in the state at the time the commencement of the proceeding. Furthermore, paragraph 1.b is not applicable **because of the requirement of having a 'person acting as parent' continued to live in the state** . . ." (Bold emphasis added.)

Note that in discussions about the Uniform Child-Custody Jurisdiction and Enforcement Act (UCCJEA) contained in 32 Family Law Quarterly 267, 343 (1998), it is stated with reference to said Uniform Child-Custody Jurisdiction and Enforcement Act that:

> "If State A had jurisdiction under this Section [UCCJEA] at the time a modification proceeding was commenced there, it would not be lost by all parties moving out of the state prior to the conclusion of proceeding . . . ."

In comparison, the language of 28 U.S.C. § 1738A provides that jurisdiction is divested by all parties moving out of the state prior to the conclusion of the proceedings under 28 U.S.C. §

1738A(c)(2)(A)(ii). Also note *Kalb* v. *Feuerstein*, 308 U.S. 433, 438-439 (1940) (concept of a state court being divested of jurisdiction). Accordingly, any orders issued by the State of New Hampshire after December 20, 2000 would be void for lack of subject-matter jurisdiction pursuant to 28 U.S.C. § 1738A. *Also see Badwell* v. *Brooks*, 141 N.H. 508, 512, 686 A.2d 1179, 1182 (1996) ("court's jurisdiction to award custody is purely statutory"). It is important to note that Kelly has wrongfully failed to return the subject child to Peter Paul Mitrano after her scheduled visitation ended on Monday, January 8, 2001. As the court stated in *Johnson* v. *Johnson*, 26 Va. App. 135, 149, 493 S.E.2d 668, 674 (1997):

> ". . . Here mother violated a custody agreement by wrongfully retaining her child after her period of physical custody concluded. In both cases, **the violating parent gained a 'tactical advantage by his conduct**.'" (Citation omitted.) (Bold emphasis added.)

Note in *Davis* v. *Gill*, 2007 WY 17, 150 P.3d 1181, 1185 (2007), the court stated in essence that it does not matter if two States have concurrent jurisdiction[1] (the only issue in

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[1] Note that the word "pending" is not defined in 28 U. S.C., § 1738A. See *Matter of B.B.R.*, 566 A.2d 1032, 1040 n.25 (D.C. 1989) wherein the court stated:

the instant case is if the Commonwealth of Virginia had retained jurisdiction pursuant to 28 U.S.C., § 1738A):

> ". . . Therefore, if there is no error in the district court's determination that Guam has jurisdiction, the question of whether Wyoming has concurrent jurisdiction is moot because a Wyoming court cannot modify a Guam decree while Guam retains jurisdiction."

Do the actions and inactions of the State of New Hampshire related to this matter justify a revolution?

Note that on April 19, 1775, over 234 years ago, our forefathers began a revolution against the King of Great Britain in order to

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"25. Subsection (g) requires the court of a second state to decline jurisdiction when a child custody proceeding is 'pend[ing]' in the courts of another state. The statute does not define the word 'pend[ing].' We turn to the law of the state where the initial action is allegedly 'pend[ing]' to establish the definition . . . ." (Citation omitted.)

protect the rights and liberties of the present citizens of the United States of America. With all due respect to this Supreme Court of the United States, have we now come full circle wherein the revolution fought so bravely by our forefathers was for naught in that we are now exposed to the tyranny that our forefathers gave up their lives to stop? Petitioner, Peter Paul Mitrano, respectfully and humbly requests that this Supreme Court of the United States rule whether the actions and inactions of the State of New Hampshire justify another revolution. See *In re Anastaplo*, 366 U.S. 82, 112 (1961) ("the men who founded this country and wrote our Bill of Rights were strangers neither to a belief in the 'right of revolution' nor to the urgency of the need to be free from the control of government") (dissent); *American Communications Ass'n, C.I.O.* v. *Douds*, 339 U.S. 382, 439 (1950) ("we cannot ignore the fact that our own Government originated in revolution and is legitimate only if overthrow by force may sometimes be justified") (dissent).

In the instant action, the State of New Hampshire has taken in essence taken away petitioner's children. Petitioner Mitrano contends that he has been subjected to the tyranny of the State of New Hampshire for too long. Enough is enough. See *In re Ford Motor Co. Erisa Litigation*, 590 F.Supp.2d 888, 911 (Mich. 2008) ("'what was the cause of the American Revolution' . . . 'one damned thing after another.'"). It is time for a meaningful change. Whether by design or otherwise, Petitioner Mitrano has been denied justice and

due process. Note the words in the dissent of *Stump* v. *Sparkman*, 435 U.S. 349, 367 (1978) "A judge is not free, like a loose cannon, to inflict indiscriminate damage whenever he announces that he is acting in his judicial capacity."

Conclusion

For these reasons, a writ of certiorari should issue to review the judgments of the Court of Special Appeals of the State of Maryland.

Respectfully submitted,

Peter Paul Mitrano
Pro se[1]
4912 Oakcrest Drive
Fairfax, Virginia 22030
Petitioner

Dated: May 14, 2009.

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1. The petitioner, Peter Paul Mitrano, is a member of the Bar of this Court.

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(2)

Supreme Court, U.S.
FILED
MAY 14 2009
OFFICE OF THE CLERK

No. 09-57

IN THE

Supreme Court of the United States

October Term, 2008

PETER PAUL MITRANO,
Petitioner,

versus

VIRGINIA L. KELLY,
Respondent.

On Petition for a Writ of Certiorari to the
Court of Special Appeals of Maryland

APPENDIX

Peter Paul Mitrano
Pro se
4912 Oakcrest Drive
Fairfax, Virginia 22030

Petitioner

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Temporary Restraining Order issued by trial court, Case No.: 59774-FL A-57

PETER PAUL MITRANO	*	**IN THE**
	*	**COURT OF**
	*	**APPEALS**
v.	*	**OF MARYLAND**
	*	**Petition Docket**
	*	**No. 544**
	*	**September Term,**
	*	**2008**
	*	(No. 531, Sept.
	*	Term, 2008 Court
VIRGINIA LEE KELLY	*	of Special Appeals)

O R D E R

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the petition be, and it is hereby, denied as there has been no showing that review by certiorari is desirable and in the public interest.

/s/ Robert M. Bell

Chief Judge

DATE: February 13, 2009

PETER PAUL MITRANO	*	**IN THE**
	*	**COURT OF**
	*	**APPEALS**
v.	*	**OF MARYLAND**
	*	**Petition Docket**
	*	**No. 331**
	*	**September Term,**
	*	**2007**
	*	(No. 2804, Sept.
	*	Term, 2006 Court
VIRGINIA LEE KELLY	*	of Special Appeals)

O R D E R

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the petition be, and it is hereby, denied as there has been no showing that review by certiorari is desirable and in the public interest.

/s/ Robert M. Bell

Chief Judge

DATE: December 7, 2007

UNREPORTED

IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 0531

September Term, 2008

PETER PAUL MITRANO

v.

VIRGINIA LEE KELLY

Hollander,
Graeff,
Moylan, Charles E., Jr.,
(retired, specially assigned),

JJ.

Opinion by Moylan, J.

Filed: November 21, 2008

59774

On January 16, 2007, the appellant, Peter Paul Mitrano (the "Father"), a resident of the Commonwealth of Virginia, filed suit in the Circuit Court of Montgomery County, Maryland, against his former wife, the appellee, Virginia Lee Kelly (the "Mother"), a resident of the State of New Hampshire. The suit was styled as a "Petition for Enforcement of a Virginia Custody Order." Following a hearing on April 18, 2008, Judge Michael D. Mason granted the Mother's motion to dismiss the Complaint with prejudice on the ground that Maryland has no jurisdiction over the suit. We wholeheartedly affirm Judge Mason's decision as undeniably correct.

Some background is desirable simply to emphasize the utter inappropriateness of this suit's ever having been filed in a Maryland court. The Mother and Father were married in 1984. They were divorced in Virginia in 1992. Three children were born of the marriage: Christina Lee Mitrano, born on October 4, 1985, and now 23 years of age; Peter Paul Mitrano, born on December 27, 1986, and now 21 years of age; and Christopher Louis Mitrano, born on December 21, 1991, and now 16 years of age. Originally all three children were the subject matter of this protracted custody squabble that has raged up and down the Eastern Seaboard of the United States, in state and federal courts alike, for 16 years. The two elder children are now emancipated. Christopher Louis Mitrano, who is just a year and a few weeks short of his own emancipation,

is the only remaining pawn in this seemingly interminable custody struggle.

In the immediate wake of the 1992 divorce, a custody hearing was held in the Circuit Court for Fairfax County, Virginia, on July 6, 1992. On September 4, 1992, that court filed the custody order that the Father continues to rely upon as the last valid and the only controlling legal action taken in this case. In it, the Mother and the Father were awarded joint physical and legal custody of the three children. The Father was awarded primary physical custody, with generous visitation privileges granted to the Mother. The custody order was incorporated into the divorce decree. To the Father's ultimate chagrin, however, time and tide moved on beyond 1992.

In the spring of 1993, the Father decided to move, along with the children, to New Hampshire. By mutual agreement, the Mother followed them there. They all lived together in the Father's house in Hanover, New Hampshire, from 1993 to 2000, although the Mother and Father did not live as husband and wife. Following a "spanking incident" and a total break-down in the relationship between the Father and Christina, a Family Division judge, in the Lebanon Family Division of Grafton County, New Hampshire, on December 28, 2000, granted to the Mother the temporary custody of Christina. The Mother moved out of the Father's house into a rented apartment of her own. Prior to the hearing in New Hampshire, the Father actually filed a trial memorandum, in which, incidentally, he did not

in any way question the jurisdictional right of New Hampshire to adjudicate the custody issue.

After the hearing, at which the Father was present and did not contest the jurisdiction of the New Hampshire courts to adjudicate regarding the custody of his children, but before the order of December 28, 2000, was filed, the Father, without prior notice to the Mother, took their two sons on an all-night drive to Virginia. The Mother moved to have the Father found to be in contempt. On January 11, 2001, the New Hampshire court ordered that the custody of the sons also be switched to the Mother but refrained from finding the Father in contempt.

That order spawned a flurry of furious activity by the Father. Before returning his two sons to New Hampshire, the Father, on January 5, 2001, filed a petition with a circuit court judge in Fairfax County, Virginia for an emergency order prohibiting the return of the children to New Hampshire. The Virginia court records show that:

> Upon learning that the children in question had been in the jurisdiction for less than two weeks and that a facially valid custody order issued by a court in New Hampshire was in existence, the court denied the Petitioner's motion.

(Emphasis supplied).

Notwithstanding that order, the Father, on January 8, 2001, presented a similar petition to a second Fairfax County judge. Following its denial, he petitioned yet a third Fairfax County judge with the same petition. The persistent refrain throughout all three petitions was that any effort to assume jurisdiction over the custody question by New Hampshire was null and void and that the controlling order, therefore, remained the Fairfax County, Virginia, order of September 4, 1992.

Ultimately all three Fairfax County judges conferred and issued a collective order rejecting the Father's thesis:

> Judge Roush conferred with Judge Valentin and Judge Hudson and denied the Emergency Petition. Judge Roush advised plaintiff that New Hampshire had jurisdiction in this matter.

(Emphasis supplied).

With respect to none of these petitions did the Father give notice to the Mother. The Father appealed those orders of the circuit court, which appeal was summarily denied on June 19, 2001. Having failed to elicit a sympathetic response from Virginia, the Father refocused his efforts on New Hampshire.

In the United States District Court for the District of New Hampshire, the Father actually filed suit against the New Hampshire state court

judge who had ordered the transfer of custody to the Mother. Mitrano v. Martin (No. CIV.01-153-M, Unpublished opinion filed on January 22, 2002), 2002 WL 122384 (D.N.H.). In granting the defendant trial judge's motion to dismiss, the federal District Judge characterized the suit:

> In this federal suit, plaintiff seeks declaratory and injunctive relief, as well as damages, against a sitting New Hampshire judge--the judge who presides over his child custody case. ... Plaintiff also challenges the New Hampshire court's jurisdiction to resolve issues related to custody of his minor children and vaguely asserts that his various complaints all add up to an actionable deprivation by the judge of his federal due process rights.

(Emphasis supplied).

On the jurisdictional issue, the federal court held that a challenge to New Hampshire's jurisdiction was a matter to be decided by the state courts of New Hampshire and ultimately, if necessary, by the Supreme Court of New Hampshire.

> [T]he New Hampshire Superior Court's exercise of jurisdiction over his child

> custody case, whether legally correct or incorrect, and its order finding him in contempt of that court, whether legally correct or incorrect, are matters which he can litigate in the state courts—appeals lie in the New Hampshire Supreme Court ....
>
> ...
>
> . . . Plaintiff is ... fully able to litigate his jurisdictional theories, claims of innocence regarding the contempt finding, and federal constitutional issues in the ongoing state proceedings.

(Emphasis supplied). The United States Court of Appeals for the First Circuit affirmed the decision of the District Court. *Mitrano v. Martin,* Nos. 02-1231, 02-1348 (1st Cir., August 29, 2002).

Meanwhile, back at the state court level, the Father had filed an emergency petition with the Supreme Court of New Hampshire on January 9, 2001. He sought "to restrain and stay the actions of the Grafton County Judicial Branch, Lebanon Family Division." The petition also requested an order enforcing the September 4, 1992 custody order of Fairfax County, Virginia. In that petition to the New Hampshire Supreme Court, the Father made precisely the same argument that he now makes before us. He claimed that the 1992 Virginia custody order was still valid because the apparently supervening New Hampshire custody order was

null and void for the reason that New Hampshire had no jurisdiction over the parties.

The Father locked in on, as the critical jurisdictional date, October 16, 2000, the day on which the Mother filed a petition to modify the custody order. In his petition to the Supreme Court of New Hampshire, the Father alleged that the Mother became a legal resident of Vermont on October 1, 2000. That was apparently the date on which the Mother had moved out of the house in Hanover, New Hampshire that she shared with the Father and the children and across the Connecticut River into a rented apartment in Norwich, Vermont. The children were still on the east side of the river, with the Father, in Hanover.

With respect to the children, however, the Father, seizing upon the then controlling weekend visitation schedule, alleged that they lived with their Mother in Vermont "from at least 6:00 P.M. on Friday, October 6, 2000 until school started at approximately 8:00 A.M. on Monday, October 9, 2000 and from 6:00 P.M. on Friday, October 13, 2000 until school started at approximately 8:00 A.M. on Monday, October 16, 2000." The Father himself acknowledged that he had been "a resident of the State of New Hampshire from 1993 until December 20, 2000," but claimed that he became a resident of Virginia on December 21, 2000, the date of his all-night drive to Virginia with his two sons. Not surprisingly, the Supreme Court of New Hampshire unanimously denied the Father's emergency petition on January 22, 2001.

On the same day that he filed his emergency petition to the Supreme Court of New Hampshire, the Father moved into simultaneous action in Vermont. On January 9, 2001, he filed in the Vermont Family Court for Windsor County, Vermont, an "Emergency Petition for Enforcement of the Attached Custody Order." The "attached custody order" was the September 4, 1992 custody order from Fairfax County, Virginia. The argument that the Father then made in Vermont is precisely the argument that he now makes in Maryland. On January 23, 2001, the presiding judge in the Windsor County Family Court granted the Mother's motion to dismiss. In the accompanying opinion, the presiding judge provided the explanation, which we hereby adopt as equally pertinent to the present appeal.

> Petitioner does not deny that the New Hampshire Family Court has issued orders addressing custody. Instead, he argues that the New Hampshire orders are not entitled to full faith and credit because of failure to comply with the PKPA, 28 U.S.C. § 1738A. Petitioner stresses that respondent and the children are now living in Norwich, Vermont, and that all of the parties ceased residing in the State of New Hampshire by December 20, 2000. According to petitioner's argument, New Hampshire is thereby deprived of PKPA

jurisdiction, under § 1783A(c)(2)(A)(ii).

However, this court disagrees with petitioner's interpretation of the PKPA. "Home State" is defined as follows:

> § 1738A(b)(4). "Home State" means the State in which, immediately preceding the time involved, the child lived with his parents, a parent, or a person acting as parent, for at least six consecutive months, ... Periods of temporary absence of any persons are counted as part of the six-month period.

Based on the undisputed facts, the condition under § 1738A(c)(2)(A)(i) was met because New Hampshire was the "home state" on the date of the commencement of the proceedings. Contrary to petitioner's argument, New Hampshire was not deprived of PKPA jurisdiction merely because the parties left.

Petitioner is not entitled to enforcement of the Virginia Order, because it has been superseded by the New Hampshire Order.

(Emphasis supplied).

The Father appealed that dismissal to the Supreme Court of Vermont. On August 29, 2001, the Vermont Supreme Court completely affirmed the decision of the Windsor County Family Court, except that it remanded the case so that the trial court could consider granting an award of attorney's fees to the Mother. The per curiam opinion of the Vermont Supreme Court pointed out that New Hampshire was properly exercising jurisdiction over the custody dispute and that, under the Parental Kidnapping Prevention Act ("PKPA"), 28 U.S.C. § 1738A(a), Vermont would be foreclosed from acting in the case. As Judge Mason ruled in the present case, that same foreclosure applies here. We find pertinent and persuasive that portion of the Vermont Supreme Court's opinion in *Mitrano v. Kelly,* 172 Vt. 643, 785 A.2d 191 (Vt. Sup. Ct. 2001).

> Father ignores the trial court's more important determination that New Hampshire was properly exercising jurisdiction over the question of custody of the parties' children at the time he sought relief in the Vermont court. This creates a more fundamental jurisdictional problem under the PKPA. Subsection (g) of the PKPA states:

> A court of a State shall not exercise jurisdiction in any proceeding for a custody or visitation determination commenced during the pendency of a proceeding in a court of another State where such court of that other State is exercising jurisdiction consistently with the provisions of this section to make a custody or visitation determination.

28 U.S.C. § 1738 A(g). If New Hampshire was properly exercising jurisdiction under the PKPA, the pendency of the action there would prevent Vermont from exercising jurisdiction under the statute.

Father argues, however, that the New Hampshire court was not exercising jurisdiction consistent with the PKPA because he moved to Virginia with the parties' sons on December 20, and because mother had moved to Vermont on October 6, the parties' daughter

	to follow the New Hampshire Order, he produced Peter, Jr., and Christopher for visitation with Kelly.[4] Kelly moved the children to Vermont.
January 9, 2001	Mitrano filed an emergency petition in the Supreme Court of New Hampshire seeking to stay the actions of the Family Division awarding sole temporary custody of Peter, Jr., and Christopher to Kelly.
January 9, 2001	In the Vermont Family Court for Windsor County, Mitrano filed

[4]In *Mitrano v. Kelly*, (No. 2001-099) (August Term, 2001) (filed August 29, 2001), the Supreme Court of Vermont commented that as Mitrano "concedes in his notice of related matters, the Virginia courts [after entering an order stating that Mitrano should follow the New Hampshire Order] declined to exercise jurisdiction over the matter in response to two of [Mitrano's] petitions to enforce the original 1992 divorce order, deferring to the New Hampshire court."

> jurisdiction over modification). Therefore, the trial court properly determined that the New Hampshire court was exercising jurisdiction consistent with the PKPA.
>
> [1]The fact that mother moved to Vermont on October 6, and the fact that the children visited with her the two weekends preceding October 16 does not change the "home state" status of New Hampshire at the time mother filed her petition seeking to modify custody. 28 U.S.C. § 1738A(b)(4) (providing that temporary absences by the children from their home state are counted as part of the six-month period that qualifies a state as such).

(Emphasis supplied). The Supreme Court of the United States denied certiorari in the case. 534 U.S. 1115, 122 S. Ct. 923, 151 L.Ed.2d 887 (2002).

Thwarted by the Supreme Courts of both Vermont and New Hampshire, the Father moved back to federal court, filing in October of 2003, almost identical suits in the United States District Courts for the Eastern District of

Virginia and for the District of New Hampshire. In those suits, moreover, he expanded his list of targets. The Report and Recommendation of the United States Magistrate Judge for the Eastern District of Virginia listed the defendants:

> The defendants in the present action were Virginia L. Kelly, plaintiff's ex-wife; William D. Philips, plaintiffs ex-wife's attorney; Martha M. Davis, plaintiffs ex-wife's attorney in New Hampshire child custody proceedings; Debora A. Blake, guardian ad litem for plaintiffs children; Elaine R. Warshell, the Vermont attorney who represented plaintiffs ex-wife in the custody dispute; Jonathan Ross, plaintiffs former New Hampshire attorney; Wiggin & Nourie, plaintiffs former New Hampshire law firm; and the Honorable Larry B. Pletcher, the Honorable John Peter Cyr, and the Honorable Willard G. Martin, Jr., judges of the New Hampshire family court.

The District Court in New Hampshire dismissed the Father's suit on May 7, 2004 and the First Circuit affirmed. Mitrano v. Warshall, Nos. 04-1784 and 04-2230 (1st Cir., September 16, 2005). The District Court for Eastern Virginia dismissed the Father's suit and

the Fourth Circuit affirmed on October 20, 2005:

> Having reviewed the briefs and applicable law, we conclude that the district court correctly decided the issue before it. We accordingly affirm the dismissal of Mitrano's claims.

In the federal case in Virginia, the defendants moved for sanctions pursuant to Rule 38 of the Federal Rules of Appellate Procedure, permitting the court to impose "just damages and single or double costs" for frivolous appeals. In recommending that sanctions be imposed, the U.S. Magistrate Judge observed:

> Plaintiff has filed frivolous suits in Vermont, New Hampshire, and Virginia against anyone having anything to do with his child custody dispute. Furthermore, as noted above, it appears that plaintiff has a history of bad faith conduct in previous unrelated litigation. Given the remarkable and deplorable history of this plaintiff, requiring him to pay the expenses of those he has wronged appears necessary to deter him from further abuses.

(Emphasis supplied).

In affirming the imposition of sanctions, the Fourth Circuit was even more scathing in its denunciation of the Father's obsessive behavior.

> Mitrano has proven himself to be extremely litigious. He has persisted in filing multiple actions despite the unanimous rejection of his claims by every court that has considered them. With regard to his activity in the federal courts, Mitrano has filed a declaratory judgment action in the District of New Hampshire, this action, and an action nearly identical to this one in the District of New Hampshire. In appealing the dismissal of each of these actions, he has ignored repeated warnings from the district courts regarding the frivolity of his claims.
>
> Moreover, when this appeal is considered together with all connected litigation and evidence of Mitrano's prior conduct in unrelated lawsuits, a clear pattern of harassing lawsuits and abusive behavior emerges.

(Emphasis supplied).

Back in New Hampshire, a final court hearing on the custody issue was held on September 27, 2002. The Father participated in

that hearing and called numerous witnesses. On that day the court passed a final order, awarding the Mother sole custody of the three children. The Father was ordered to make child support payments in the amount of $1,406 per week. The Mother was also granted an attachment against the Father's property in Hanover, where the family had lived between 1993 and 2001 and which the Father continued to own thereafter. On December 10, 2002, the Father was found in contempt of court for failure to make his child support payments. The arrearages at that time were $14,560. They continued to escalate. An execution on the Father's real estate was ordered on August 15, 2005. The Father did not appear in New Hampshire and warrants were issued for his arrest.

A decree of the Family Division Court filed on February 20, 2008, declared that the Father's "unpaid child support arrearage and related obligations" through June 20, 2005, totaled $243,357.39 plus interest of $8,287.92. The Mother asserted that the Father had further accrued an additional $182,780 in unpaid child support obligations through December 19, 2007, for a total due of $447,055.94 plus accrued interest. At an execution sale of the Hanover real estate on December 13, 2006, the Mother was the highest bidder and is now the owner of the home, where she lives with her younger son, Christopher, the subject of the custody battle.

In the face of this adjudicative juggernaut, it is incredible that the Father would elect to

bring this suit in Maryland. The slender jurisdictional reed which the Father grasps is his allegation that "Kelly moved to the State of Maryland in the Fall of 2005 and left the State of Maryland after January 16, 2007." It was on January 16, 2007 that the present suit in Montgomery County was filed. With respect to Christopher, the object of this custody battle, the Father's affidavit which accompanied his complaint further alleged that "the subject child (CLM) has lived with the defendant (the Mother) in the State of Maryland since approximately the Fall of 2005 (except for attending boarding school in the State of New York during the school year for 2005/2006)."

The Mother, for her part, explained that in the Fall of 2005, she temporarily moved to Maryland to be near her sister because of extreme financial distress, severely aggravated if not totally caused by the arrearages in child support payments of over $400,000. With the execution of December 13, 2006, on the Father's house in Hanover, however, her financial horizon markedly brightened. She and Christopher are both now back in the home in Hanover into which they first moved in 1993. The Mother actually maintains that when the present suit was filed, on January 16, 2007, both she and Christopher had already left Maryland to return to New Hampshire. For our analysis, however, it really does not make any difference.

At the hearing on April 18, 2008, Judge Mason immediately sensed the bankruptcy of the Father's position. Although the Mother's

argument seems unassailable that Maryland has no jurisdiction over this custody dispute, it is unnecessary to belabor the issue. With a sure instinct for the jugular, Judge Mason by-passed that question by assuming that he had jurisdiction over the case.

> MR. MITRANO: [T]his Court has subject matter jurisdiction.
> THE COURT: Well let's assume I do.
> MR. MITRANO: Okay, I just wanted to –
> THE COURT: I assume I have subject matter jurisdiction.
> MR. MITRANO: – I just wanted to make sure –
> THE COURT: Let's assume I do.
> MR. MITRANO: – okay. Accepting that, the next issue that was raised is whether this Court has personal jurisdiction.
> THE COURT: Assume I do.

(Emphasis supplied).

Cutting to the core of what was before him, Judge Mason said, in effect, "Forget jurisdiction. Lets assume I have it. What then? Where do you go from there? What is it, precisely, that you want me to do?" Formally, what the Father wanted was for Judge Mason to enforce a 16-year-old custody order from the State of Virginia. In order to do that, however, it would have been necessary for Judge Mason

to determine that numerous intervening rulings and adjudications by the courts of the State of New Hampshire were null and void.

Judge Mason dismissed the Father's suit for three separate reasons. We would affirm that dismissal for any one of those reasons.

> THE COURT: [F]irst with respect to the motion to dismiss, it's granted. I find that under Family Law Section 9.5-207, that at a minimum, assuming this Court had jurisdiction, this would be an inconvenient forum to litigate these issues and the proceedings would be better litigated in the State of New Hampshire.

(Emphasis supplied).

Maryland Code, Family Law Article, § 9.5-207(a) provides:

> (a) Action if this State is inconvenient forum.--(1) A court of this State that has jurisdiction under this title to make a child custody determination may decline to exercise its jurisdiction at any time if it determines that it is an inconvenient forum under the circumstances and that a court of another state is a more appropriate forum.

> (2) The issue of inconvenient forum may be raised upon motion of a party, the court's own motion, or request of another court.

(Emphasis supplied).

The second reason advanced by Judge Mason for dismissing the suit was that there was an action with respect to the custody of Christopher then pending in the court system in New Hampshire.

> THE COURT: Beyond that, I find under Family Law 9.5-206 that there is an action pending with respect to the custody of the child in the State of New Hampshire, pursuant to their order which originally issued, I think, in '02 as we have been discussing it --
>
> MR. MITRANO: September 27th, 2002.
>
> THE COURT: -- and that after exercising their discretion as of that date they've never relinquished their jurisdiction, so I grant the motion to dismiss on at least those two grounds.

(Emphasis supplied).

Family Law Article, § 9.5-206(a) provides:

> (a) When other state more appropriate.-- Except as otherwise provided in § 9.5-204 of this subtitle, a court of this State may not exercise its jurisdiction under this subtitle if, at the time of the commencement of the proceeding, a proceeding concerning the custody of the child has been commenced in a court of another state having jurisdiction substantially in conformity with this title, unless the proceeding has been terminated or is stayed by the court of the other state because a court of this State is a more convenient forum under § 9.5-207 of this subtitle.

(Emphasis supplied). Also pertinent is United States Code, Title 28, § 1738A(g):

> A court of a State shall not exercise jurisdiction in any proceeding for a custody or visitation determination commenced during the pendency of a proceeding in a court of another State where such court of that other State is exercising jurisdiction consistently with the provisions of this section to

> make a custody or visitation determination.

(Emphasis supplied).

When Judge Mason first asked the Father whether issues concerning Christopher were then pending in New Hampshire, it triggered the Clintonesque response of, in effect, "That all depends upon what 'pending' means." The exchange between the two was revealing.

> THE COURT: [T]here's also an argument ... that because the same or similar action is pending in another state, that I should defer to the jurisdiction of that state.
>
> MR. MITRANO: First of all, I want to say it is not pending, as I understand the word "pending."
>
> . . .
>
> THE COURT: Let me ask this: There are proceedings ongoing in the of New Hampshire that relate to this matter?
>
> MR. MITRANO: Okay, there was a sale of my property in New Hampshire, pursuant to certain allegations of judgment. I filed a petition--still objecting to the jurisdiction of the New Hampshire

Court--I filed a petition for redemption, because the New Hampshire law allows a redemption period of one year if certain moneys are paid and I exercised that right.

That's the decision of March that came from the New Hampshire Court dealing with the redemption of that property. It's not--what I wouldn't really call that the custody proceeding because the custody--I just want to make clear that I contend that the New Hampshire custody matter is not pending at this time.

THE COURT: ... [A]re you telling me are you representing to the Court that there are no ongoing court actions relating to the issue of the custody of your child in the courts of New Hampshire, without regard to whether they are properly ongoing?

MR. MITRANO: Okay.

THE COURT: Are you telling me that New Hampshire is not taking any action with respect to custody and/or visitation of your minor son in this case?

MR. MITRANO: As I understand it, yes. I'm saying my understanding is premised on my understanding of the word "pending."

THE COURT: I didn't say pending. I took that word out of it.

MR. MITRANO: Well, okay--

THE COURT: When is the last time that a court in New Hampshire issued an order that related in any way to your son?

MR. MITRANO: ... I'd say the last time they issued an order related to my son was September 27th. 2002--but I want to qualify that. Since then. there have been issues about child support, but child support and custody are two different matters. As far as custody, the last order was issued September 27th, 2002, with respect to custody. And then there's been an issue of payment of child support, and my property or the house I used to live in in New Hampshire was sold in December, 2006, without giving me any notice of the sale prior to the sale.

But, in any event, I did file a petition in December of 2007 requesting that I be allowed to redeem the property, and in that order that came out of the court in March, from Lebanon, New Hampshire, they denied my right of redemption and they also stated I was behind in child support, and issued a capeous for

my arrest, I believe, and the made other statements.

That order has been appealed. I appealed it, I filed an appeal, a timely appeal, to the Supreme Court of New Hampshire. So, it's presently pending--that matter is presently pending before the Supreme Court of New Hampshire, but it deals with, in my mind, the redemption of the property. But I did –

THE COURT: Let me ask you this: Aren't custody and support inter-related? Because the person entitled to support of necessity you would think would be the person having custody, so if they didn't have custody they wouldn't be entitled to support. If the courts were to grant you custody, then you'd be entitled arguably to support.

MR. MITRANO: There's a distinction in my mind between custody and child support. Right now I'm arguing custody. They are, obviously they're related, because as the Court just stated, but there's a distinction in my mind between a custody issue and a child support issue –

THE COURT: Yes.

MR. MITRANO: – and right now I'm asking for enforcement of a custody order.

> THE COURT: Let me ask you this: Did the order of support arise out of the same case that the order for custody arises out of? Or are they separate actions?
>
> MR. MITRANO: In New Hampshire I believe they've incorporated in the same--there's an incorporation of a payment, it's attached I believe to the complaint.
>
> THE COURT: So. it's the same case.
>
> MR. MITRANO: Right, right.
>
> THE COURT: Okay.

(Emphasis supplied).

We are satisfied that issues related to the custody of Christopher were, indeed, pending in New Hampshire.

Judge Mason's final reason for dismissing the suit was that the critical issue of whether New Hampshire had jurisdiction over the custody of Christopher had not only already been litigated but had been litigated and relitigated and then litigated again.

> THE COURT: I will tell you right now that with respect to that argument of whether the New Hampshire order is void, it is the Court's view having looked at your proceedings that you cannot now litigate that issue before this Court for a number of reasons one of them

> being estoppel or issue preclusion, which is: You have litigated that . . . particular issue in a number of different courts, and that particular issue has been finally determined as to you, against you. So, you cannot raise and litigate that issue again here – without regard to whether you filed a claim or not – you are precluded from contesting that issue. So I'll not hear you that the New Hampshire order in '02 was moot or void.

(Emphasis added).

As the Father continued doggedly to attack the validity of the New Hampshire decisions, Judge Mason reiterated his position.

> THE COURT: I've seen those arguments, I've read those arguments, but I will not entertain those arguments. That issue has been resolved adverse to you, and it is my view that you cannot now contest that same issue in this proceeding. [C]ertainly I understand respectfully you disagree and you have that issue you can take up on appeal. If I'm wrong, they'll tell me I'm wrong.
>
> MR. MITRANO: Okay, but if I may just explore that –

> THE COURT: No, you don't need to explore it because I've read your pleadings. Your pleadings are voluminous, I've read them, I understand the argument, I just believe that that has been finally adjudicated, as to you.

(Emphasis added).

When the issue of New Hampshire's jurisdiction over the custody of Christopher was presented to Judge Mason, trial courts in Virginia, in New Hampshire, and in Vermont had all ruled that New Hampshire had proper jurisdiction. The Supreme Court of New Hampshire and the Supreme Court of Vermont had both held that New Hampshire had proper jurisdiction. Federal courts in both the First Circuit and the Fourth Circuit had ruled that New Hampshire had proper jurisdiction. It would have been a bold pronouncement for Judge Mason to have said otherwise, which, of course, he did not. As the hearing of April 18, 2008, concluded, Judge Mason once again was forced to repeat that the issue had been laid to rest.

> THE COURT: I determine that you are precluded from raising it, so I will not entertain an argument that the New Hampshire order is moot or void--okay? For the reasons that you assert in your pleadings. I disagree. It's, for

> purposes of this hearing, a valid order when it issued, and there are then matters still pending in New Hampshire relating to that same case.
>
> MR. MITRANO: If the Court is ruling that the New Hampshire order is valid —
>
> THE COURT: For purposes of this hearing and as to you, yes, I am. I'm saying that you're precluded from contesting its validity.

(Emphasis supplied).

Amen! We could readily have affirmed Judge Mason's ruling far more summarily. We have analyzed it in greater depth, however, for the potential guidance of possibly similarly situated colleagues in other states. Although the calendar has but thirteen months to run before this child reaches the age of emancipation, there are still 46 states that have not rejected the Father's arguments. For all we know, the Mother, from her "home state" of New Hampshire, may have been improvident enough to have risked overnight shopping trips into Connecticut or Massachusetts or, God forbid, Quebec. We would be loath to see the final act of this long running drama play out at the Hague.

JUDGMENT AFFIRMED; COSTS TO BE PAID BY APPELLANT.

UNREPORTED

IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 2804

September Term, 2006

PETER PAUL MITRANO

v.

VIRGINIA LEE KELLY

Murphy, C.J.,
Getty, James S.,
(Ret., specially assigned),
Alpert, Paul E.,
(Ret., specially assigned),
JJ.

Opinion by Alpert, J.

Filed: August 20, 2007

This appeal arises from an ongoing custody dispute between appellant Peter Paul Mitrano, and appellee, Virginia Lee Kelly, Mitrano's ex-wife. The dispute has crossed several state lines. In Maryland, in the Circuit Court for Montgomery County, Mitrano sought the issuance of a warrant to take custody of a minor child born to the marriage and a determination of whether an *ex parte* order of the New Hampshire, Judicial Branch, Family Division awarding sole temporary custody of the minor child to Kelly was void. The Circuit Court for Montgomery County denied appellant's request to take the child into custody, but issued a temporary restraining order prohibiting Kelly from removing the minor child from the State of Maryland. The circuit court did not rule on the validity of the New Hampshire court's order. Mitrano noted this appeal and presents two questions for our review:

> I. Did the circuit court err in denying Mitrano's motion for issuance of a warrant to take custody of the minor child?
> II. Did the circuit court err in failing to rule on whether the *ex parte* order of the New Hampshire court was void as a matter of law?

We conclude that this appeal is not properly before us.

BACKGROUND

For the sake of clarity, we set forth the relevant events as a time line:

September 4, 1992	Mitrano and Kelly were divorced by Order of the Circuit Court for Fairfax County, Virginia, which also awarded Mitrano and Kelly joint physical and legal custody of the three minor children born to the marriage: Christina Lee Mitrano, born October 4, 1985; Peter Paul Mitrano, born December 27, 1986; and Christopher Louis Mitrano, born December 21, 1991. It was also ordered that the children would reside primarily with Mitrano.[1] The

[1]The Order provided that "the minor children of the parties shall reside primarily with Peter [Mitrano], and the minor children shall be with their mother on each Wednesday from 5:00 p.m. until 8:00 p.m., for dinner, and the first weekends of each month beginning at 6:00 p.m. on the first Friday of each month continuing until Monday at 9:00 a.m., or when school begins...."

	youngest child, Christopher, the subject of the current dispute, is the only child who is still a minor.
Spring 1993	Mitrano moved to New Hampshire with the three minor children and Kelly consented to this move.
Late 1993 or 1994[2]	Kelly moved to New Hampshire and resided with Mitrano and the children in Mitrano's house located in Hanover, New Hampshire.

[2]The New Hampshire, Judicial Branch, Family Division, found that Kelly lived with Mitrano and the children from approximately December 1993 until approximately October 2000. Mitrano asserts that Kelly resided with him and the children in New Hampshire from late 1994 until approximately October 1, 2001. When Kelly registered the Fairfax County Circuit Court child custody order as a foreign decree in New Hampshire, she indicated that she had resided in New Hampshire since 1994.

October 2000	Kelly moved to Vermont.[3]
October 3, 2000	Kelly registered the Fairfax County Circuit Court child custody decree in New Hampshire.
October 16, 2000	Kelly filed an *ex parte* petition in the State of New Hampshire, Judicial Branch, Family Division, seeking sole legal and physical custody of the minor children. Kelly alleged that, on September 13, 2000, Mitrano had

[3]The exact date of this move is not clear, but in Kelly's *ex parte* petition filed in New Hampshire on October 16, 2000, she asserted that, on October 12, 2000, Mitrano had informed her that if she filed any papers with the court seeking modification of the child custody or support orders, she could no longer live in the Hanover residence. In her petition, she also asserted that she had rented a house suitable for her and the three minor children. In a statement of facts that were not disputed by Mitrano, the Supreme Court of Vermont indicated that Kelly had moved to Vermont on October 6, 2000.

	spanked Christina "in a fit of anger" and left her "physically bruised[.]" The court granted temporary custody of Christina to Kelly.
December 28, 2000	Following a hearing on the Family Division's *ex parte* order, that court awarded temporary custody of Christina to Kelly.
December 2000	Mitrano moved to Virginia with Peter, Jr., and Christopher without notifying Kelly.
January 3, 2001	Kelly filed an *ex parte* petition in the State of New Hampshire, Judicial Branch, Family Division, seeking sole temporary physical custody of Peter, Jr., and Christopher. The Family Division granted the petition.
January 5, 2001	After the Circuit Court for Fairfax County ruled that Mitrano was

joining her following the October 16 order. He concludes that these events deprived New Hampshire of "home state" status. This argument is without merit. The PKPA provides that a state makes a custody determination consistent with the PKPA if it has jurisdiction under its own laws and "such State ... is the home State of the child on the date of the commencement of the proceeding." 28 U.S.C. § 1738A(c)(1) & (2)(A) (emphasis added). "Home state" is defined as "the State in which, immediately preceding the time involved, the child lived with his parents [or] a parent ... for at least six months." 28 U.S.C. § 1738A(b)(4). The parties and their children had been living in New Hampshire for the seven years prior to the court assuming jurisdiction on October 16, 2000, when the modification proceeding was commenced by mother's petition.[1] Furthermore, father states in his filing before the trial court that Virginia--the state issuing the original custody decree--had declined jurisdiction in favor of New Hampshire. See 28 U.S.C. § 1738A(f) (allowing modification of a custody decree from another state if the state has declined to exercise

	an emergency petition for enforcement of the Fairfax County Circuit Court custody order.
January 11, 2001	Following a hearing on Kelly's petition in the New Hampshire Family Division at which Kelly and Mitrano were present, the court denied Mitrano visitation, ordered him to pay support, and found him in contempt for removing the children from New Hampshire without seeking permission from the court.
January 23, 2001	The Vermont Family Court dismissed Mitrano's petition, finding that under the Parental Kidnaping Prevention Act, 28 U.S.C. § 1738A [hereinafter 'PKPA"], New Hampshire was the "home state" on the date the proceedings commenced, that Mitrano "[was] not entitled to enforcement

of the Virginia Order, because it [had] been superseded by the New Hampshire Order[,]" and that Mitrano therefore failed to state a claim upon which relief could be granted.

January 24, 2001 The Supreme Court of
January 24, 2001 New Hampshire denied Mitrano's emergency petition.

August 29, 2001 August 29, 2001 The Supreme Court of Vermont affirmed the decision of the Vermont Family Court determining that the New Hampshire court properly exercised jurisdiction consistent with the PKPA.

2002-2003 2002-2003 Mitrano filed motions in the United States District Courts for the District of New Hampshire and the Eastern District of Virginia, which were denied or dismissed and

	the denial or dismissal affirmed on appeal.
January 16, 2007	Mitrano filed a complaint in the Circuit Court for Montgomery County alleging that Kelly and Christopher, who was still a minor, resided in Montgomery County. Mitrano sought enforcement of the Virginia Custody Order, issuance of a warrant to take physical custody of Christopher, a declaratory judgment that the New Hampshire custody orders were void, or, in the alternative, modification of the custody and support order from New Hampshire. Mitrano filed an affidavit asserting that Christopher had lived with Kelly "in the State of Maryland since approximately the Fall of 2005 (except for

attending boarding school in the State of New York during the school year for 2005/2006)[.]"

January 17, 2007 — Mitrano filed three motions in the Circuit Court for Montgomery County:

1) Emergency Motion for Temporary Restraining Order to Prevent Defendant [Kelly] from Removing Minor Child from the State of Maryland Pending Determination of Declaratory Judgment Action. In this motion, Mitrano alleged that he had spoken to Kelly by calling a Maryland telephone number and informed her that Christopher was to remain in Maryland.

2) Emergency Motion and/or Request and/or Second Verified Application for the Issuance of a Warrant to take Custody of Child.

	In this motion, Mitrano sought the issuance of a warrant to take immediate custody of Christopher. 3) Emergency Motion to Determine Whether the Subject New Hampshire Order is Void as a Matter of Law. A hearing was held before the Circuit Court for Montgomery County, which entered an order enjoining Kelly from removing Christopher from the State of Maryland without leave of the court.
January 17-29, 2007	Montgomery County Sheriffs Office attempted service eight times at residence in Bethesda that Mitrano alleged was where Kelly was residing with Christopher.
January 30, 2007	Mitrano filed a motion in the Circuit Court for Montgomery County to allow service of the

temporary restraining order by other means. The court denied the motion as it appeared that Christopher was no longer in the state and thus there was no need for immediate injunctive relief.

February 9, 2007 — Mitrano's motion to continue hearing on the temporary restraining order scheduled for this date was granted and a new hearing date of March 2, 2007, set. In the motion, Mitrano averred that, on January 29, 2007, when the Montgomery County Sheriff's Office attempted service on Kelly, the sheriff was informed by the desk clerk that Kelly had not been seen in the past two weeks. Mitrano further alleged that, after the temporary restraining order was sent to the Sheriff's Office in New Hampshire, on February 5, 2007, a

	New Hampshire sheriff spoke with Kelly, who informed the Sheriff that she was at work.[5]
February 16, 2007	Mitrano noted an appeal to this Court.
February 20, 2007	Circuit Court for Montgomery County ordered that the temporary restraining order was to remain in effect.
March 2, 2007	Mitrano moved to continue the hearing set for this date as Kelly had not been served. New hearing date of April 13, 2007, set.
March 20, 2007	Kelly filed a motion in the Circuit Court for Montgomery County to dismiss Mitrano's motion for a temporary restraining order to prevent her from removing Christopher

[5] In 2000, Kelly was employed at Dartmouth College as a nurse doing clinical research.

prevent her from removing Christopher from the State of Maryland. Mitrano filed a motion in the Circuit Court for Montgomery County to determine whether the order of the New Hampshire Family Division is void *as a* matter of law.

DISCUSSION

In Mitrano's first question, he asks whether the trial court erred in failing to grant his motion to issue a Warrant to take custody of Christopher, but fails to present argument in support of his position. *See* Md. Rule 8-504(a)(5) (a party's brief must include argument in support of the party's position); *Klauenberg v. State*, 355 Md. 528, 552 (1999) ("arguments not presented in a brief or not presented with particularity will not be considered on appeal") (citation omitted). Instead, Mitrano focuses his argument on the validity of the *ex parte* order from the New Hampshire Family Division and asserts that all judgments or orders entered by the New Hampshire court are void because of a lack of subject matter jurisdiction. He asserts that the New Hampshire court violated 28 U.S.C. § 1738A(e) by issuing the *ex parte* order granting sole temporary custody of the child,

Christopher,[6] to Kelly. He contends that when Kelly commenced custody litigation in New Hampshire on October 16, 2000, under 28 U.S.C. § 1738A(b)(4), Christopher did not have a "home state" because, on or about October 1, 2000, Kelly had moved to Vermont and Christopher was living with her on certain weekends. More importantly, Mitrano asserts that New Hampshire was not the child's "home state." Mitrano further alleges that when he left New Hampshire and moved with Christopher back to Virginia on December 20, 2000, in accordance with 28 U.S.C. § 1738A, the New Hampshire court no longer had subject matter jurisdiction. Thereafter, Kelly returned to Vermont with Christopher. Mitrano thus concludes that the order of the New Hampshire court violated 28 U.S.C. § 1738A(e) and that any decisions from the state courts of New Hampshire are void as a matter of law because the courts lacked subject matter jurisdiction.

Mitrano claims that the Commonwealth of Virginia had and has continuing jurisdiction based on his and/or the paternal grandparents' residences there. Although he asserts that jurisdiction resides with Virginia, he also claims that this Court has

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[6]Although this order granted Kelly temporary custody of all three children, the present dispute involves only Christopher because he is the only child who is still a minor.

> authority to examine whether the New Hampshire to examine whether the New Hampshire court had subject matter jurisdiction to render the decision granting sole temporary custody of Christopher to Kelly. He asks this Court to find that the plain language of 28 U.S.C. § 1738A(c)(2)(A) means that the New Hampshire court no longer had jurisdiction after all the parties moved from that State.

In the alternative, Mitrano claims that even if the New Hampshire court had jurisdiction, the *ex parte* order granting sole temporary custody of Christopher to Kelly was void because the notice required by 28 U.S.C. § 1738A was not given. Accordingly, Mitrano claims, the *ex parte* order from New Hampshire is not entitled to full faith and credit.

Kelly responds that this Court lacks subject matter jurisdiction over this action and that the New Hampshire courts have jurisdiction. She also claims that there is no final or interlocutory order from which Mitrano may appeal. We begin by determining whether this appeal is properly before us.

In general, appeals may only be taken from a final judgment of the trial court pursuant to Md. Code (1974, 2006 Repl. Vol.), § 12-301 of the Courts and Judicial Proceedings Article, which states that "a party may appeal from a final judgment entered in a civil ... case ... [whether] entered ... in the exercise of original, special, limited, or statutory jurisdiction, unless ... expressly denied by law." *Smith v. Taylor*, 285 Md. 143, 146 (1979); *see*

also Popham v. State Mut. Ins. Co., 333 Md. 136, 142 (1993) ("Unless an appeal is from a final judgment, the appellate court does not acquire subject matter jurisdiction to review it.") (Citations omitted). "A ruling of the circuit court, to constitute a final judgment, must, among other things, be an 'unqualified, final disposition of the matter in controversy.' *Gruber v. Gruber*, 369 Md. 540, 546 (2002) (quoting *Rohrbeck v. Rohrbeck*, 318 Md. 28, 41 (1989)). Stated another way, "[f]or the trial court's ruling to be a final judgment it must either determine and conclude the rights of the parties involved or deny a party the means to 'prosecut[e] or defend[his or her rights and interests in the subject matter of the proceeding.'" *In re Billy W.*, 386 Md. 675, 688 (2005) (quoting *Rohrbeck*, 318 Md. at 41). "In considering whether a particular court order or ruling constitutes an appealable judgment, we assess whether any further order was to be issued or whether any further action was to be taken in the case." *In re Samone H.*, 385 Md. 282, 298 (2005) (citation omitted).

Clearly, the circuit court's denial of Mitrano's motion to take Christopher into custody was not a final judgment as it did not finally dispose of the controversy. The order of the circuit court was thus interlocutory and ordinarily is not appealable unless it falls within one of the statutory exceptions set forth in Md. Code (1974, 2006 Repl. Vol.), § 12-303 of the Courts and Judicial Proceedings Article [hereinafter "C.J."]. *In re Samone H.*, 385 Md.

at 298. Relevant to our discussion is the exception provided in § 12303(x), which states:

> A party may appeal from any of the following interlocutory orders entered by a circuit court in a civil case:
>
> * * *
>
> (3) An order:
>
> * * *
>
> (x) Depriving a parent, grandparent, or natural guardian of the care and custody of his child, or changing the terms of such an order[.]

Accordingly, to be appealable under Section 12-303(x), an order denying Mitrano's motion to take the child into custody must either operate to deprive Mitrano of the care and custody of Christopher or change the terms of Mitrano's care and custody of the child. *In re Samone H.*, 385 Md. at 299 (commenting that to be appealable under C.J. § 12-303(x), the denial of a motion for an independent study on bonding between the mother and her children had to either operate to deprive the mother of the care and custody of her children or to change the terms of her care and custody of the children). In the present case, the order denying Mitrano's request to take

Christopher into custody did not operate to deny Mitrano the care and custody of Christopher or change the terms of Mitrano's care and custody of the child. The denial simply maintained the status quo. If the motion had been granted, care and custody of Christopher would have been taken away from Kelly, who had been granted sole temporary custody of the child by the New Hampshire Family Division. With the motion to take Christopher into custody, Mitrano was, in effect, asking the Circuit Court for Montgomery County to alter the custody order that had been in effect since 2001. The denial of that motion did not deny Mitrano of the care or custody of his child or change his care or custody of the child and is thus not an interlocutory order appealable under C.J. § 12-303(x). *See generally In re Billy W.*, 386 Md. at 692 (orders continuing the permanency plans for the four children were not appealable because the orders did not detrimentally affect the mother's custody rights or visitation with the children, even though the mother had sought full custody); *In re Samone H.*, 385 Md. at 315-16 (trial court's denial of mother's request for an independent study of the bonding between herself and the children, who had previously been found to be children in need of assistance, was not an interlocutory order appealable under C.J. § 12-303(x) because the denial of the mother's request did not change the permanency plan, which was for the adoption of the children;

> the mother's rights would have been implicated if the permanency plan had been for reunification and the court had changed the plan to adoption); *Gruber,* 369 Md. at 546-48 (circuit court's determination that it had jurisdiction to determine custody of the parties' minor children was not an appealable order under C.J. § 12-303(x)

because it did not deprive a parent of care and custody of a minor child). *Cf. Frase v. Barnhart,* 379 Md. 100, 115-20 (2003) (circuit court's denial of the mother's motion to postpone a review hearing was appealable under C.J. § 12303(x) because implicit in the denial of the motion to postpone was also the denial of the mother's request to strike the conditions of the custody order requiring the mother to apply for and accept residence at St. Martin's House because those conditions effectively undermined the discretion that goes with legal and physical custody of the child.)

Further, the docket entries reveal that Mitrano's motion to determine whether the subject New Hampshire order is void as a matter of law is still open and that, on March 20, 2007, Mitrano requested a hearing on that motion. Accordingly, the motion is still before the circuit court for consideration and any determination by this Court regarding an alleged failure to rule by the circuit court would be premature.

APPEAL DISMISSED.
COSTS TO BE PAID BY APPELLANT.

IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND

PETER PAUL MITRANO

Plaintiff

v. **Case No.: 59774-FL**

VIRGINIA LEE KELLY

Defendant

TEMPORARY RESTRAINING ORDER

UPON CONSIDERATION of Plaintiff's Emergency Motion for a Temporary Restraining Order Pending Resolution of Plaintiff's Petition to Enforce Virginia Custody Order, notice having been given to Defendant, Defendant having made no appearance, and a preliminary hearing having been held, it is this 17th day of January, 2007, by the Circuit Court for Montgomery County, Maryland:

ORDERED that the Defendant, Virginia Lee Kelly, be, and hereby is, prohibited from removing the minor child, Christopher L. Mitrano, from the State of Maryland, pending a further hearing on Motion for a Temporary Restraining Order; and it is further

ORDERED that, pursuant to Maryland Rule 2-121, the Plaintiff serve a copy of this Order, Plaintiff's Motion for Temporary Restraining Order and Plaintiff's Petition to Enforce Virginia Custody Order on the Defendant, in person, by the 29th day of January, 2007; and it is further

ORDERED that, unless Defendant requests an expedited hearing in accordance with the Maryland Rules, a further hearing on Plaintiff's Motion for a Temporary Restraining Order be, and hereby is, set for the 9th of February, 2007 at 9:30 a.m. for one half-hour.

_____/s/_____
The Honorable Durke G. Thompson
Circuit Court for Montgomery County, MD